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# Greffe: A Section 8 Triumph or a Thorn in the Side of Law Enforcement

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**GREFFE: A SECTION 8 TRIUMPH OR A THORN  
IN THE SIDE OF DRUG LAW ENFORCEMENT?**

by

ALAN YOUNG\*

## INTRODUCTION

The distribution of illegal drugs has always attracted special attention from law enforcement officials. Since the enactment of our first prohibition on the trade in narcotics in 1908, law enforcement officials have constantly bemoaned their powerlessness in combatting the drug trade. Through concerted lobbying efforts they have managed to bring into place a statutory enforcement scheme that is far more rigorous and invasive than that of conventional law enforcement.<sup>1</sup> Even so, official dissatisfaction remained.

Many of the extraordinary powers given to law enforcement officials have been abrogated or have recently been struck down for constitutional infirmity,<sup>2</sup> but there still persists an attitude among state agents that the war on drugs is a unique law enforcement concern that necessitates special powers and privileges. For the most part the judiciary has concurred with this approach, and it is common to see judicial pronouncements like the following from *R. v. Brezack*, [1949] O.R. 888, 9 C.R. 73 at 78-79, 96 C.C.C. 97, [1950] 2 D.L.R. 265 (C.A.):

Constables have a task of great difficulty in their efforts to check the illegal traffic in opium and other prohibited drugs. Those who carry on the traffic are cunning, crafty and unscrupulous almost beyond belief. While, therefore,

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<sup>1</sup>For a discussion of the history of this legislation, see R. Solomon and Melvyn Green, "The First Century: The History of Non-Medical Use and Control Policies in Canada, 1870-1970", in P. Erickson (ed.), *Illicit Drug Use In Canada: A Risky Business* (1989). The somewhat extraordinary powers applicable to narcotics enforcement included whipping, minimum sentences, reverse onuses, warrantless search powers, writ of assistance powers, deportation sanctions and limited powers of judicial review.

<sup>2</sup>For example, the reverse onus with respect to possession for the purpose of trafficking was struck down in *R. v. Oakes*, [1986] 1 S.C.R. 103, 50 C.R. (3d) 1, 24 C.C.C. (3d) 321, 26 D.L.R. (4th) 200, 19 C.R.R. 308, 14 O.A.C. 335, 65 N.R. 87, the minimum sentence for importation was struck down in *R. v. Smith*, [1987] 1 S.C.R. 1045, 58 C.R. (3d) 193, [1987] 5 W.W.R. 1, 15 B.C.L.R. (2d) 273, 34 C.C.C. (3d) 97, 40 D.L.R. (4th) 435, 31 C.R.R. 193, 75 N.R. 321, and the power to search by writ of assistance was repealed by the Criminal Law Amendment Act, R.S.C. 1985, c. 27 (1st Supp.), s. 200.

it is important that constables should be instructed that there are limits upon their right of search, including search of the person, they are not to be encumbered by technicalities in handling the situations with which they often have to deal in narcotics cases, which permit them little time for deliberation and require the stern exercise of such rights of search as they possess.

This statement of judicial intent was made in the context of a body cavity search that was premised upon the slimness of justificatory grounds. Some 30 years later the issue of justification for body cavity searches found its way to the Supreme Court of Canada, and now, in the constitutional context, the court may have reversed the long-standing trend of the judiciary in paying scant attention to improper or unauthorized police practices in the investigation of narcotics cases: *R. v. Greffe*, ante, p. 257, also [1990] 3 W.W.R. 577, 73 Alta. L.R. (2d) 97. Greffe was found to be carrying about 40 gm of heroin in his anal passage and, due to violations of the accused's rights under ss. 8 and 10(b) of the Canadian Charter of Rights and Freedoms, the court excluded the evidence and entered an acquittal. Dickson C.J.C., in dissent, referred to the constitutional violations as being "technical in nature and an example of minor police stupidity" (p. 269); however, the majority implicitly rejected the notion that constitutional violations should be discounted as mere technical breaches simply because they arise in the context of the war on drugs.

Despite the contrasting legal analysis, both the majority and the minority expressed deep concern over the possibility that obviously guilty drug traffickers might escape justice because the "constable blundered". Dickson C.J.C. commented that the remedying of the violation of the accused's constitutional rights in this case would raise the ire of the public because the violation "amounts to the kind of 'technical' violation which the general public in the United States frequently derides when an unquestionably culpable accused in that country is acquitted of very serious charges" (p. 269). Lamer J. was willing to remedy the violations, but he clearly stated that he was doing so with "great hesitation given the manifest culpability of the appellant of a crime that I consider heinous" (p. 292). These expressions of judicial regret might suggest that this case is truly a borderline case in which the noble values of the Charter may have been needlessly spent; however, on another interpretation one might conclude that the type of subterfuge and deceit exercised by the police in this case is the very reason why the constitutionalization of procedural rights in the criminal process was a needed and desirable development.

## SECTION 8 AS A BARRIER TO CONVICTION IN NARCOTICS CASES

The Supreme Court of Canada has on numerous occasions excluded confessions made by arguably guilty murderers<sup>3</sup> without expressing the same compunction and reservations expressed in this case. Surely the court is not suggesting that murder is a less heinous crime than drug trafficking, but rather their reluctance to apply the Charter in the context of drug trafficking is a reflection of the legitimate concern that drug trafficking poses unique problems for law enforcement. Every day thousands of passengers arrive in Canada at the various international airports, and recent statistics show that air travel remains the predominant mode of transporting drugs into Canada.<sup>4</sup> It is clear that the police are able to intercept only a small percentage of the illicit drugs that are imported by means of couriers using air travel, especially when one takes into account the furtive methods of an "alimentary canal smuggler"<sup>5</sup> like Greffe. The difficulties in detecting air travel couriers exist independently of the Charter, and the critical question is whether a rigorous application of s. 8 of the Charter exacerbates an already difficult situation.

Section 8 of the Charter is an easy scapegoat for law enforcement problems. This Charter right imposes certain restrictions upon the ability of the police to invade the privacy of one's body or belongings, and common sense suggests that legal restrictions on the invasive powers of the police would make the detection of drug importation at the airport even more difficult. In contrast, s. 10(b) of the Charter places no substantive obstacles in the way of investigatory detection of narcotics. Assuming that the police meet the prerequisites for a constitutionally reasonable

<sup>3</sup>See, e.g., *Clarkson v. R.*, [1986] 1 S.C.R. 383, 50 C.R. (3d) 289, 25 C.C.C. (3d) 207, 26 D.L.R. (4th) 493, 19 C.R.R. 209, 69 N.B.R. (2d) 40, 177 A.P.R. 40, 66 N.R. 114; *R. v. Brydges*, 74 C.R. (3d) 129, [1990] 2 W.W.R. 220, 71 Alta. L.R. (2d) 145, 53 C.C.C. (3d) 330, 103 N.R. 282 (S.C.C.).

<sup>4</sup>The R.C.M.P. note that air travel is the mode of transportation for 88 per cent of the heroin, 38 per cent of the cocaine and 30 per cent of the marijuana imported into Canada: see R.C.M.P., National Drug Intelligence Estimate 1987/88, pp. 4-9.

<sup>5</sup>Technically, Greffe is not an "alimentary canal smuggler", as this term applies only to individuals who have swallowed contraband, as opposed to simply placing the contraband in a bodily orifice. Nevertheless, I will refer to Greffe as belonging in this category, because, whether the smuggler has deposited the drugs in his/her internal organs or his/her bodily orifices, both scenarios pose unique difficulties for law enforcement. For a discussion of drug smuggling by way of bodily concealment, see Note (1986), 16 Seton Hall L. Rev. 763.

search, the requirement of providing an accused with a reasonable opportunity to consult with a lawyer should not prevent a search, but merely delay its execution.<sup>6</sup>

Accordingly, when the court noted that the police violated Greffe's s. 10(b) rights by not informing him of his right to counsel before the strip-search, this does not in any way suggest that a proper furnishing of this right would have prevented the police from ultimately discovering the drugs. Of course, there was a remote possibility that counsel would have instructed the accused concerning his right to a review of the decision to conduct a body search, and that upon the review the designated official might have barred the search because of the absence of reasonable and probable grounds. However, the thwarting of the search would then, in these circumstances, be premised upon non-compliance with the threshold requirements of s. 8. Any way you look at it, s. 8 of the Charter is the culprit.

In order to understand if s. 8 is really a formidable obstacle to conviction in drug cases, one must compare the constitutionally deficient practice of the police in this case with the proper practice that should have been employed to comport with the Constitution. In this case the police received a "tip" from a confidential informant that the accused would be bringing drugs into Canada by plane. Assuming that the information received by the police was sufficient to constitute reasonable and probable grounds, the police would have been entitled to arrest the accused and then execute a search incident to arrest, or to arrest him and keep him under close observation until he passed the contraband through his system, or to simply execute a power of search pursuant to the Narcotic Control Act, R.S.C. 1985, c. N-1.

<sup>6</sup>Of course the Supreme Court of Canada has noted in this case and others (see *R. v. DeBot*, [1989] 2 S.C.R. 1140, 73 C.R. (3d) 129, 52 C.C.C. (3d) 193, 102 N.R. 161 [Ont.]; *R. v. Simmons*, [1988] 2 S.C.R. 495, 67 O.R. (2d) 63, 66 C.R. (3d) 297, 2 T.C.T. 4102, 18 C.E.R. 227, 45 C.C.C. (3d) 296, 55 D.L.R. (4th) 673, 38 C.R.R. 252, 30 O.A.C. 241, 89 N.R. 1; and *R. v. Strachan*, [1988] 2 S.C.R. 980, 67 C.R. (3d) 87, [1989] 1 W.W.R. 385, 43 C.C.C. (3d) 497, 56 D.L.R. (4th) 673, 37 C.R.R. 335, 90 N.R. 273 [B.C.]) that there is a relationship between compliance with s. 8 and s. 10(b), in that s. 10(b) violations can affect the reasonableness of a search; however, the relationship is limited to the unique circumstances of border searches and consent searches (see *DeBot* at p. 199), and, in any event, a s. 10(b) violation that precedes a search will barely satisfy the nexus requirement of s. 24(2) (i.e., that the violation resulted in the obtaining of evidence), and the remote connection between the violation and the discovery of the evidence would probably result in few instances of actual exclusion of the real evidence.

Clearly, the availability of these options undercuts the suggestion that the police are handicapped in the investigation of drug offences. There are nevertheless certain statutory and constitutional limitations imposed upon the police in the execution of the search powers under the Narcotic Control Act, namely, the Constitution would not permit a warrantless search unless the obtaining of a warrant was impracticable. This constitutional requirement would not have posed a problem in this case, considering that the police had been waiting a week for the accused's arrival at the airport. In addition, the scope of the power to search a person under the Narcotic Control Act is unclear – the law is unsettled as to whether the power to search a person is triggered only by an initial search of a place, with the search of persons being incidental to the search of the targeted place, or whether the right to search a person is a power that exists independently of the power to search a suspected location.

Despite the availability of these options, with the few stated limitations, the police approached the investigation in a furtive and indirect manner. They did not arrest the accused upon his arrival, but rather directed him to secondary inspection for a routine customs search in the hope that the contraband would be found in his belongings. This indirect approach may have been fruitless but in itself is not objectionable. However, when this approach proved to be of no value, the police adopted a rather bizarre method to further their investigation. They arrested the accused on unrelated and outstanding warrants for traffic violations. One can only assume that this strange and strained arrest was made to thwart the accused's exercise of his s. 10(b) rights, in the sense that most individuals arrested for traffic violations would not consider consulting with a lawyer, even after being informed of this right, due to the trivial nature of the charges. On the basis of this unusual arrest the police then arrogated to themselves the right to conduct the most intrusive of all possible searches – a body cavity search.

Clearly, one cannot gainsay the court's conclusion that an arrest for traffic offences cannot justify a body cavity search;<sup>7</sup> however, can it not still be argued that the pretext arrest was simply a foolish and impulsive manoeuvre by the police that was not altogether that insidious, because

<sup>7</sup>The majority judgment on this point suggests that the earlier decision of the Supreme Court of Canada in *Cloutier v. Langlois*, [1990] 1 S.C.R. 158, 74 C.R. (3d) 316, 53 C.C.C. (3d) 257 [Que.], placing few limits on the power to search incident to arrest, must be narrowly interpreted: see Stuart, Annotation to *Cloutier v. Langlois* (1990), 74 C.R. (3d) 318.

the police in fact possessed the requisite authority to search? That is to say, if the police met the threshold requirement of having reasonable and probable grounds, even though they chose a rather unorthodox manner to act upon their belief, this should be of no consequence, because they could have exercised the intrusive power by the more conventional approaches mandated both by statute and by the Constitution.

Unfortunately, this was not just a case of unorthodox investigative methods. This was a case in which the court called into question the very justification for any of the options permitted by law. The court held that the record did not adequately disclose that the police possessed reasonable and probable grounds to believe that the accused was in possession of a narcotic. The record did disclose that the police acted upon "confidential information received and background investigation", but no further evidence was adduced to elaborate upon this information. The lower courts had assumed that the police possessed the requisite grounds because whatever information they possessed proved to be correct, in that the accused was actually found in possession of narcotics. Lamer J. correctly rejects this *ex post facto* justification – allowing the fruits of a search to justify the initial intrusion would entirely undermine any protection that individuals have against unreasonable search and seizure. Perhaps the information received by the police was substantial enough to constitute reasonable and probable cause; however, Lamer J. is surely correct in refusing to speculate upon the content of the information that the Crown could have easily adduced into evidence.

In both its pre-Charter and its post-Charter form, the law is well settled in its requirement that the police provide an adequate foundation for the assessment of reasonable and probable grounds. Mere conclusory assertions are never adequate. In their assessment of reasonable and probable grounds, the police are entitled to rely upon situational clues that they observe, or upon information received from confidential informants. Information that is received from confidential informants poses distinctive problems, in that this second-hand information is subject to the abuse that the informant may be mistaken, deceitful or bent upon revenge. Accordingly, the law requires that these "tips" possess sufficient substance to elevate them beyond mere gossip or rumour. The police may act upon this information only if the informant has proved reliable in the past, if the information is credible or subject to corroboration and if the informant discloses the basis of the acquisition of the information, so that it has an air of reality. The courts adopt a "totality of circumstance" approach in that weakness in one factor of assessment

(e.g., an informant of questionable reliability) may be compensated by strengths in other factors (e.g., a detailed tip that was acquired through direct contact with the suspect).<sup>8</sup>

The requirement of strict scrutiny of second-hand "tips" is not a mere technical obstacle, but is the essence of the protection against unreasonable search and seizure. In the seminal case of *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, 41 C.R. (3d) 97 (sub nom. *Can. (Dir. of Investigation & Research, Combines Investigation Branch) v. Southam Inc.*), [1984] 6 W.W.R. 577, 33 Alta. L.R. (2d) 193, 27 B.L.R. 297, 84 D.T.C. 6467, 14 C.C.C. (3d) 97, 11 D.L.R. (4th) 641, 2 C.P.R. (3d) 1, 9 C.R.R. 355, 55 A.R. 291, 55 N.R. 241, the Supreme Court of Canada placed the objective criterion of probable cause in proper perspective. It was said that "The state's interest in detecting and preventing crime begins to prevail over the individual's interest in being left alone at the point where credibly-based probability replaces suspicion" (p. 120 (C.R.)). The requirement of reasonable and probable grounds has instrumental and intrinsic value. It prevents the police from engaging in "random virtue testing"<sup>9</sup> and provides a clear demarcation of the boundary of the individual's right to privacy free from unwarranted state intrusion.

If one characterizes the *Grefe* case as one in which the police lacked reasonable and probable grounds, then it would be unfair to accuse the court of allowing a clearly guilty drug trafficker to escape justice on a mere technicality. Probable cause constitutes the primary justification for most state intrusions, and to relegate this element to the domain of technicality is to trivialize the entire enterprise of rights in the criminal process. In his dissenting judgment, Dickson C.J.C. does not suggest that the requirement of reasonable and probable grounds is a mere technicality; rather his concern lies in the fact that the police were not acting capriciously or on a whim in detaining and searching the accused. He recognized that their assertion of probable cause was lacking, but he also

<sup>8</sup>For a review of the leading cases dealing with the assessment of reasonable and probable grounds as based upon informants' tips, see *Illinois v. Gates*, 462 U.S. 213, 76 L. Ed. 2d 527, 103 S. Ct. 2317 (1983), rehearing denied 463 U.S. 1237, 77 L. Ed. 2d 1453, 104 S. Ct. 33; *R. v. Pastro* (1988), 42 C.C.C. (3d) 485, 39 C.R.R. 108, 66 Sask. R. 241 (C.A.); *R. v. DeBot* (1986), 54 C.R. (3d) 120, 30 C.C.C. (3d) 207, 26 C.R.R. 275, 17 O.A.C. 141, affirmed *supra*, note 6.

<sup>9</sup>This expression is taken from Lamer J. in his description of the objectionable aspects of police entrapment in *R. v. Mack*, [1988] 2 S.C.R. 903, 67 C.R. (3d) 1 at 31, [1989] 1 W.W.R. 577, 44 C.C.C. (3d) 513, 37 C.R.R. 277, 90 N.R. 173 [B.C.].

recognized that "this is not a case where there was no evidence at all" (p. 266).

The real dilemma in this case relates to the recurring problem of what options are available to the police when they have an articulable suspicion that criminal activity is under way yet their suspicions cannot be elevated to probable cause.<sup>10</sup> The current approach to s. 8 of the Charter is rather blunt and crude — if the police have reasonable and probable grounds, they may act, and if their information falls short of this standard then they cannot undertake any intrusive activity at all. American jurisprudence recognizes a middle ground. Since the seminal case of *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968), the United States Supreme Court has recognized that the police may undertake a brief investigatory detention if they have a reasonable suspicion that falls short of probable cause.

The *Terry* "stop and frisk" doctrine empowers the police by enabling them to take mildly intrusive action in order to confirm or dispel their reasonable suspicions. The doctrine is not without its share of problems. The development of the doctrine has been rather unruly, and the brief investigatory detention permitted under the doctrine has expanded to accommodate police activity of greater intrusiveness.<sup>11</sup> Even with this middle ground power based upon reasonable suspicion, American law enforcement officials have encountered difficulties in investigating the activities of drug couriers arriving at airports.

In deciding to investigate passengers arriving at airports, the police rely upon "tips", as in the *Greffe* case, or upon the notorious "drug

<sup>10</sup>This problem presented itself in a different context in *R. v. Duguay*, [1989] 1 S.C.R. 93, 67 O.R. (2d) 160, 67 C.R. (3d) 252, 46 C.C.C. (3d) 1, 56 D.L.R. (4th) 46, 38 C.R.R. 1, 31 O.A.C. 177, 91 N.R. 201, in which the police had a "hunch" about the guilt of a number of suspects but mistakenly decided to exercise the power of arrest for investigatory purposes. It is clearly wrong for the police to exercise the intrusive power of arrest on less than reasonable and probable grounds; however, what is left unanswered by this case is the issue of available investigatory options in cases in which the police possess a reasonable suspicion but not one that can be elevated to probable cause.

<sup>11</sup>See the gradual expansion of the doctrine in the cases of *Florida v. Royer*, 460 U.S. 491, 75 L. Ed. 2d 229, 103 S. Ct. 1319 (1983); *U.S. v. Place*, 462 U.S. 696, 77 L. Ed. 2d 110, 103 S. Ct. 2637 (1983); *U.S. v. Sharpe*, 470 U.S. 675, 84 L. Ed. 2d 605, 105 S. Ct. 1568 (1985).

courier profiles".<sup>12</sup> The profile is an amalgam of factors concerning the appearance of passengers, the circumstances of their travel plans and their activities in the airport. It is a crude barometer of suspicious activity that has little predictive value and can potentially apply to any traveller who exhibits any signs of nervousness. Nevertheless, the United States Supreme Court has held that the profile can constitute reasonable suspicion, thus allowing for a brief detention for the purposes of questioning or to have luggage sniffed by dogs trained in drug detection: *U.S. v. Sokolow*, 109 S. Ct. 1581 (1989). Allowing the "stop and frisk" doctrine to apply based upon the profile does substantially facilitate the investigation of narcotics offences, but it is still rather ineffective in combating "alimentary canal smugglers" such as Greffe.

The United States Supreme Court has not allowed these smugglers to evade investigation by reason of their clever and dangerous acts of concealing drugs in their bodies. In the case of *U.S. v. Montoya de Hernandez*, 473 U.S. 531, 87 L. Ed. 2d 381, 105 S. Ct. 3304 (1985), they expanded the "stop and frisk" doctrine beyond recognition. In that case, the accused arrived at the Los Angeles airport on a flight from Colombia. Upon questioning at customs, suspicions were raised because of her evasive answers and bizarre travel plans. On the basis of this suspicion (which the court assumed to be reasonable) she was taken for a pat-down and a strip-search. Noticing an unusual firmness in her abdominal region, the police requested that she undertake an X-ray, but she declined, because of her claim that she was pregnant. Accordingly, she was placed in a small room with a wastebucket, and the authorities waited until "her peristaltic functions produced a monitored bowel movement" (p. 394). The court noted her "heroic efforts to resist the usual calls of nature" (p. 387), and after some 16 hours the police finally obtained a warrant authorizing both an X-ray and a rectal examination. In the end it was discovered that she had swallowed 88 balloons, containing 528 gm of cocaine.

<sup>12</sup>For a discussion of the operation of the drug courier profile, see C. Becton, "The Drug Courier Profile: 'All Seems Infected that Th' Infected Spy, As All Looks Yellow to the Jaundic'd Eye'" (1987), 65 North Carolina L. Rev. 417; P. Greenberg, "Drug Courier Profiles, Mendenhall and Reid: Analyzing Police Intrusions on Less than Probable Cause" (1981), 19 Amer. Crim. L. Rev. 49. See also *R. v. Gladstone*, 47 C.R. (3d) 289, [1985] 6 W.W.R. 504, 22 C.C.C. (3d) 151, 18 C.R.R. 99 (B.C.C.A.), for a discussion of the profile in the Canadian context.

The dissenting judges called this a "disgusting and saddening episode at our Nation's border" (p. 394). They accepted that air travellers can be routinely subjected to questioning, pat-downs and luggage searches, but recoiled at the suggestion that someone can be held for 16 hours based upon a mere reasonable suspicion. In a rhetorical flourish, the dissent stated that "Indefinite involuntary incommunicado detentions 'for investigation' are the hallmark of a police state, not a free society" (p. 397). The majority were not equally concerned. They stated at p. 391:

We hold that the detention of a traveller at the border, beyond the scope of a routine customs search and inspection, is justified at its inception if customs agents, considering all the facts surrounding the traveller and her trip, reasonably suspect that the traveller is smuggling contraband in her alimentary canal.

Even though the *Terry* investigatory detention contemplated only a brief, non-intrusive detention, the court stated that they rejected any "hard-and-fast time limits" (p. 392), and introduced a temporal restriction of such great flexibility that this middle ground investigatory aid has become virtually indistinguishable from the full-scale search based upon probable cause.

Turning back to the circumstances of the *Grefe* case, the issue for future consideration concerns police powers in the face of received information that falls short of reasonable and probable grounds. Assuming that the "tip" received by the police at least constituted reasonable suspicion of Grefe's criminality (and assuming that the police do not engage in bad faith actions such as a pretext arrest), the question raised is whether the police are entitled to act upon the reasonable suspicion or whether they have to let Grefe slip through their fingers. Canadian law would not permit the same abusive action as was taken in the *Hernandez* case, *supra*. In that case the accused was held incommunicado for 16 hours, whereas our régime of rights would require that she be permitted to consult a lawyer once the police decided to detain her in order to conduct a strip-search. Section 10(b) is triggered by detention, whereas *Miranda* warnings are triggered only by "custodial interrogation".<sup>13</sup>

<sup>13</sup>See *Miranda v. Arizona*; *Vignera v. New York*; *Westover v. U.S.*, 384 U.S. 436 at 447, 16 L. Ed. 2d 694, 86 S. Ct. 1602, 10 A.L.R. 3d 974 (1966), rehearing denied 385 U.S. 890 (sub nom. *California v. Stewart*), 17 L. Ed. 2d 121, 87 S. Ct. 11; *California v. Beheler*, 463 U.S. 1121, 77 L. Ed. 2d 1275, 103 S. Ct. 3517 (1983).

As a minimum safeguard, it is thus clear that under the Charter the police will not be permitted to act in an intrusive manner without providing an opportunity to consult counsel. However, this safeguard does not address the issue of whether any intrusive activity premised upon a reasonable suspicion can be undertaken in the first place. Admittedly, the law is unsettled, but certain propositions can be stated with some certainty:

1. If the police decide to detain the air traveller based upon reasonable suspicion, this may constitute an arbitrary detention under s. 9 of the Charter. This may not be the case if the detention is brief and non-intrusive, but will likely be the case if the detention amounts to a *de facto* arrest: *Duguay*, *supra*, note 10.

2. More specifically, it is clear that, if the traveller is required to undertake a strip-search, then this will be a detention and thus s. 9 problems will be triggered: *Simmons*, *supra*, note 6.

3. With respect to the powers of search, the Supreme Court of Canada has recognized that the safeguards of *Hunter v. Southam*, *supra*, must be applied contextually; therefore, in the context of a border search the safeguards will be reduced somewhat. The extent of the reduction is unclear; however, the court did approve of the standard of "reasonable cause to suppose" contained in the old Customs Act, R.S.C. 1970, c. C-40 [repealed R.S.C. 1985, c. 1 (2nd Supp.), s. 212(3)]: *Simmons*, *supra*, note 6. This cryptic phrase may be seen as allowing for searches at the border based upon reasonable suspicion.

4. However, not all searches are commensurate for purposes of Charter analysis. Some searches are clearly more intrusive than others, and it is recognized that "when the search threatens his bodily integrity, the relevant standard may be a different one": *Hunter*, *supra*, at p. 120 (C.R.). The relevant standard to be applied is not clear, but surely invasions of bodily integrity will not be permitted upon reasonable suspicion and perhaps not even upon the standard of probable cause.

Accordingly, it can be seen that, in the context of the border, the police may not necessarily be handicapped when they possess only reasonable suspicion. They would probably be allowed to conduct searches of a minor nature to accompany their power to question; however, the rectal examination undertaken in the *Grefe* case would probably be prohibited unless the police had clear and convincing reasons to conduct this major intrusion. Finally, there is also an unresolved issue looming in the



background, in that the current jurisprudence may result in the characterization of any body search based upon less than reasonable and probable grounds as being an arbitrary detention.

One should not have to speculate upon the scope of police powers, and the current uncertainty in the law underscores the need for legislative intervention. A clear and detailed statutory framework is needed both to empower the police and to protect the individual. The current uncertainty means that the respective rights and obligations of police and individuals are being determined on a case-by-case basis through the unpredictable and open-ended application of the Charter's exclusionary rule. Both the state and the individual will find out if their respective rights and/or powers are worthy of protection only by an after-the-fact judicial inquiry into whether the state action brings the administration of justice into disrepute.

The Supreme Court of Canada has attempted to structure the discretionary elements of the exclusionary rule by the enumeration of three sets of factors that the court must explore in their determination of whether the administration of justice has been brought into disrepute.<sup>14</sup> The first factor, and perhaps the primary one, relates to the implications that the nature of the evidence obtained by the Charter violation may have on the fairness of the trial. This has resulted in the controversial division of evidence into two distinct categories, conscripted and real evidence, with the latter category in effect being given less protection.<sup>15</sup> In fact, the criteria advanced by the Supreme Court of Canada seem to relegate the right in s. 8 to a position of being an inferior right because its breach can result in the obtaining of only pre-existing real evidence.

After the articulation of the real/conscripted evidence distinction, numerous appellate courts have been reluctant to grant remedies for s. 8 violations, because the collection of real evidence is deemed not to affect the accused's right to a fair trial. In fact, the Supreme Court of Canada has refused to exclude real evidence obtained as a result of s. 8 violations

<sup>14</sup>See *R. v. Collins*, [1987] 1 S.C.R. 265, 56 C.R. (3d) 193, [1987] 3 W.W.R. 699, 13 B.C.L.R. (2d) 1, 33 C.C.C. (3d) 1, 38 D.L.R. (4th) 508, 28 C.R.R. 122, 74 N.R. 276, in which the court suggests that the factors to be considered can be lumped into three categories: (1) fairness of the trial; (2) seriousness of the Charter violation; and (3) effect of exclusion on the administration of justice.

<sup>15</sup>For a critique of this distinction, see R.J. Delisle, "Collins: An Unjustified Distinction" (1987), 56 C.R. (3d) 216.

on a number of occasions because of this distinction.<sup>16</sup> However, in recent cases the Supreme Court has excluded real evidence due to the flagrant nature of the Charter violation. In *R. v. Genest*, [1989] 1 S.C.R. 59, 67 C.R. (3d) 224, 45 C.C.C. (3d) 385, 37 C.R.R. 252, 19 Q.A.C. 163, 91 N.R. 161, and in the *Grefe* case, real evidence obtained as a result of a pattern of disregard of Charter rights has resulted in exclusion. These recent cases show that s. 8 will not be treated as a right that attracts no remedy, although it is apparent that the police can violate s. 8 rights with less fear of losing probative evidence.

In conclusion, it can be stated that s. 8 does not present an insurmountable obstacle to the effective enforcement of narcotics laws. Even with a rigorous and strict application of s. 8, the police may still rely upon the fact that real evidence will rarely be excluded in the absence of egregious circumstances. The *Grefe* case is significant in that it clearly sends out a message that the absence of reasonable and probable grounds is not a mere technical violation but rather a violation of substance that can lead to exclusion of evidence. Nevertheless, the case also has a disconcerting side, in that one must ask why the police felt the need to employ deception and subterfuge. The simple answer may be that this shows bad faith on the part of officers who have little regard for the rights contained in the Charter. However, it may be more likely that the police simply did not know with certainty what was permitted and what was prohibited in terms of investigation after the receipt of information that fell short of reasonable and probable grounds.

The *Grefe* case may be significant in that it rescues s. 8 from the danger of being relegated to the position of an inferior right, yet the case does little to answer the question of what is permitted in the absence of probable cause. Perhaps the court is not the appropriate institution for establishing a code of police powers, but, in the absence of legislative initiative, cases like this one will only serve as a bandage to repair the

<sup>16</sup>See *R. v. Hamill*, [1987] 1 S.C.R. 301, 56 C.R. (3d) 220, [1987] 3 W.W.R. 726, 13 B.C.L.R. (2d) 24, 33 C.C.C. (3d) 110, 38 D.L.R. (4th) 611, 28 C.R.R. 148, 75 N.R. 149; *R. v. Sieben*, [1987] 1 S.C.R. 295, 56 C.R. (3d) 225, [1987] 3 W.W.R. 722, 13 B.C.L.R. (2d) 30, 32 C.C.C. (3d) 574, 38 D.L.R. (4th) 427, 28 C.R.R. 145, 74 N.R. 271; *R. v. Simmons*, supra, note 6; *R. v. Jacoy*, [1988] 2 S.C.R. 548, 66 C.R. (3d) 336, [1989] 1 W.W.R. 354, 2 T.C.T. 4120, 18 C.E.R. 258, 45 C.C.C. (3d) 46, 38 C.R.R. 290, 89 N.R. 61 [B.C.]; *R. v. Strachan*, supra, note 6. In these cases the court also relied upon the factor of good faith in deciding to admit the evidence; therefore, it is difficult to say with certainty that the primary factor was simply that the evidence obtained was real evidence.



damage caused by unauthorized state intrusions that come to light in cases that manage to surface in the Supreme Court of Canada on a piece-meal basis. The daily interactions between state officials and individuals at airports remain fraught with ambiguity and uncertainty.

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